

1
2
3
4
5
6
7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE DISTRICT OF ARIZONA**

9 **DAVID ANTHONY STOKES,**)
10 **Plaintiff,**)
11 **v.**) **CIV 04-02845 PHX DGC (MEA)**
12 **JOSEPH ARPAIO,**) **REPORT AND RECOMMENDATION**
13 **Defendant.**)
14 _____)

15 **TO THE HONORABLE DAVID G. CAMPBELL:**

16 This matter is before the Magistrate Judge on referral
17 from the District Judge, and the determination of the Magistrate
18 Judge is dispositive of some of Plaintiff's claims.
19 Accordingly, the following proposed findings of fact, report,
20 and recommendation, are made pursuant to Rule 72(b), Federal
21 Rules of Civil Procedure, and 28 U.S.C. § 28(b)(1)(B) and (C).
22 Before the Court is Plaintiff's motion for leave to amend his
23 complaint (Docket No. 22).

24 **Background**

25 Plaintiff, presently incarcerated in the Arizona State
26 Prison in Florence, Arizona, filed a *pro se* complaint pursuant
27 to 42 U.S.C. § 1983 on December 9, 2004. Docket No. 1. On
28 October 14, 2005, the Court ordered Defendant to answer

1 Plaintiff's allegation that Defendant violated Plaintiff's
2 Eighth Amendment rights by serving him inadequate meals, given
3 his medical condition, and by subjecting him to overcrowded and
4 unsanitary living conditions at the Towers Jail facility while
5 Plaintiff was a pre-trial detainee. See Docket No. 4. The
6 Court dismissed the Maricopa County Sheriff's Office and the
7 "Towers Jail" as defendants in the order of October 14, 2005.
8 Id. On June 14, 2006, the Court denied Defendant's motion to
9 dismiss based on a failure to exhaust administrative remedies.
10 See Docket No. 16.

11 The parties have engaged in limited discovery.
12 Discovery is to be completed by December 1, 2006. The deadline
13 for filing dispositive motions is December 29, 2006. See Docket
14 No. 17. Pursuant to a scheduling order issued by the Court on
15 June 16, 2006, Plaintiff was allowed until September 22, 2006,
16 to amend his complaint. See id. Plaintiff's proposed First
17 Amended Complaint was docketed as lodged September 28, 2006, and
18 was signed September 22, 2006. See Docket No. 24. Defendant
19 Arpaio has not responded to Plaintiff's motion for leave to file
20 an amended complaint, but filed an answer to the original
21 complaint on November 3, 2006. See Docket No. 25.

22 Plaintiff's lodged amended complaint seeks to amend his
23 complaint to add defendants. See Docket No. 24. Plaintiff
24 seeks to add as defendants, Fulton Brock, Don Stapley, Andrew
25 Kunasek, Max Wilson, and Mary Rose Wilcox, as individuals and in
26 their capacities as the Maricopa County Board of Supervisors.
27 Id. at 2. Plaintiff contends these individuals, as "the final
28

1 policy-makers for Maricopa County [are] the officials most
2 responsible for the operation, management and control of the
3 MCSO." Id.

4 Plaintiff also seeks leave to amend to plead
5 "improperly pled factual allegations and legal claims for
6 relief." Id. at 4. Plaintiff seeks to assert both Eighth
7 Amendment and Fourteenth Amendment claims. Plaintiff asserts
8 that, in addition to failure to provide him with an adequate
9 diet, Defendants otherwise failed to provide Plaintiff with
10 "reasonably adequate medical care," in violation of his right to
11 be free of cruel and unusual punishment and in violation of his
12 right to due process.

13 Analysis

14 Rule 15(a), Federal Rules of Civil Procedure, provides
15 that a plaintiff should be given leave to amend his complaint
16 when justice so requires. See, e.g., United States v. Hougham,
17 364 U.S. 310, 316, 81 S. Ct. 13, 17 (1960); Howey v. United
18 States, 481 F.2d 1187, 1190 (9th Cir. 1973). Leave to amend a
19 complaint should be granted if it appears at all possible that
20 the plaintiff can correct a defect in his complaint. See Lopez
21 v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000). "Thus Rule 15's
22 policy of favoring amendments to pleadings should be applied
23 with extreme liberality. This policy is applied even more
24 liberally to pro se litigants." Eldridge v. Block, 832 F.2d
25 1132, 1135 (9th Cir. 1987) (internal citations and quotations
26 omitted).

1 In screening pro se prisoner complaints the Court is
2 obliged to liberally construe the complaint:

3 The handwritten pro se document is to be
4 liberally construed. . . . [A] pro se
5 complaint, "however inartfully pleaded," must
6 be held to "less stringent standards than
7 formal pleadings drafted by lawyers" and can
8 only be dismissed for failure to state a
claim if it appears "'beyond doubt that the
plaintiff can prove no set of facts in
support of his claim which would entitle him
to relief.'"

9 Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292 (1976)
10 (quoting Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594,
11 596 (1972)).

12 In exercising its discretion with regard to a motion to
13 amend a complaint filed after a responsive pleading, the Court
14 should consider the prejudice to the opposing party and the
15 futility of allowing the amendment. See Schlachter-Jones v.
16 General Tele., 936 F.2d 435, 443-44 (9th Cir. 1991). "[T]he
17 policy of allowing the amendments of pleadings must be tempered
18 with considerations of undue delay, bad faith or dilatory motive
19 on the part of the movant, repeated failure to cure deficiencies
20 by amendments previously allowed, undue prejudice to the
21 opposing party by virtue of allowance of the amendment, futility
22 of amendment, etc." Id. at 443 (internal quotations omitted).
23 The Court would have to dismiss a claim added to a complaint if
24 the plaintiff raised a claim that was legally frivolous or
25 malicious, that failed to state a claim upon which relief may be
26 granted, or that sought monetary relief from a defendant who is
27 immune from such relief. 42 U.S.C. § 1997(c)(1) (2003 & Supp.

1 2006).

2 Only defendants which are "persons" can be sued
3 pursuant to section 1983. To state a claim against a government
4 unit pursuant to section 1983, the plaintiff must establish an
5 affirmative causal link between a governmental policy or
6 practice and the alleged constitutional violation. See City of
7 Canton v. Harris, 489 U.S. 378, 385-85, 109 S. Ct. 1197, 1203
8 (1989); Monell v. Department of Soc. Servs., 436 U.S. 658,
9 690-95, 98 S. Ct. 2018, 2035-38 (1978). While a county is a
10 "person" for purposes of section 1983, counties are liable only
11 for rights deprivations pursuant to official custom or policy.
12 See Monell, 436 U.S. at 690-95, 98 S. Ct. at 2035-38.

13 In order to hold the County liable under §
14 1983, [the plaintiff] must show "(1) that he
15 possessed a constitutional right of which he
16 was deprived; (2) that the [County] had a
17 policy; (3) that the policy 'amounts to
18 deliberate indifference' to [the plaintiff's]
19 constitutional right; and (4) that the policy
is the 'moving force behind the
constitutional violation.'" Oviatt v.
Pearce, 954 F.2d 1470, 1474 (9th Cir. 1992)
(quoting City of Canton v. Harris, 489 U.S.
378, 389-91, 109 S. Ct. 1197, 103 L. Ed. 2d
412 (1989)).

20 Anderson v. Warner, 451 F.3d 1063, 1070 (9th Cir. 2006).

21 Additionally, there is no respondeat superior liability
22 pursuant to section 1983. To state a claim against a government
23 official, the civil rights plaintiff must allege the official
24 personally participated in the constitutional deprivation or
25 that a governmental supervisory official was aware of the
26 widespread abuses and acted with deliberate indifference to the
27 plaintiff's constitutional rights or failed to take action to

1 prevent further misconduct. See Rizzo v. Goode, 423 U.S. 362,
2 377 (1976); King v. Atiyeh, 814 F.2d 565, 568 (9th Cir. 1987).

3 Plaintiff contends the Board of Supervisors:

4 intentionally, deliberately, and with gross
5 disregard, delayed or denied adequate funding
6 to Defendant Arpaio in order for Defendant
7 Arpaio to relieve the overcrowded conditions
8 at the TJF in a timely manner or fashion.
9 Further, due to the long standing-nature of
10 these conditions created as a direct result
11 of the policies, practices and procedures of
12 Defendant Arpaio, Defendant Maricopa County
Board of Supervisors knew or should have
known that the TJF was so grossly overcrowded
as to amount to an infringement of
Plaintiff's constitutionally secured rights
and intentionally, deliberately and with
gross disregard, failed to provide adequate
resources to alleviate them.

13 Id. at 6.

14 Plaintiff contends these actions resulted in the wanton
15 infliction of unnecessary pain, proscribed by the Eighth
16 Amendment. Plaintiff contends his liberty interest in being
17 free of the intentional, wanton infliction of pain without due
18 process of law, pursuant to the Fourteenth Amendment, was
19 violated by Defendants. Id. at 7. The amended complaint seeks
20 declaratory relief, compensatory and punitive damages, and
21 Plaintiff's fees in litigating this matter. Id. at 8.

22 The Board of Supervisors is not a proper defendant to
23 this action. Local government bodies, such as Arizona counties,
24 are persons under § 1983 and may be sued for constitutional
25 injuries. However, liability may only be imposed on the county
26 if the plaintiff establishes that his injuries were inflicted
27 pursuant to an official county policy or custom, or by

1 deliberate indifference rising to a level of official custom.
2 See Anderson, 451 F.3d at 1070; Gibson v. County of Washoe, 290
3 F.3d 1175, 1185-86 (9th Cir. 2002); Thompson v. City of Los
4 Angeles, 885 F.2d 1439, 1443 (9th Cir. 1989). A section 1983
5 claim against an Arizona county "cannot succeed as a matter of
6 law" unless the plaintiff: (1) contends that the county
7 maintains a policy or custom pertinent to his alleged injury;
8 and (2) alleges how the policy or custom caused the plaintiff's
9 injury. See Sadoski v. Mosley, 435 F.3d 1076, 1080 (9th Cir.),
10 cert. denied, 126 S. Ct. 2864 (2006).

11 Official county policy may only be set by an official
12 with "final policymaking authority." Thompson, 885 F.2d at
13 1443. To identify those officials with "final policymaking
14 authority," the Court looks to state law. Id. In Arizona, the
15 responsibility of operating jails is placed by law upon the
16 sheriff, not on the county's Board of Supervisors. See Ariz.
17 Rev. Stat. Ann. §§ 11-441(A)(5) & 31-101. Therefore, the Board
18 of Supervisors is not liable to Plaintiff under § 1983 because
19 it lacks authority to establish an official policy with respect
20 to the operation of the jail. Further, the Board of Supervisors
21 cannot be held liable for the actions of the sheriff or his
22 deputies on a theory of respondeat superior liability. See
23 Thompson, 885 F.2d at 1443. Accordingly, Plaintiff should not
24 be allowed to amend his complaint to name the members of the
25 Maricopa County Board of Supervisors as defendants in this
26 matter.

1 A claim that the defendants failed to provide a
2 pretrial detainee with adequate medical care and that they
3 subjected him to improper living conditions is properly asserted
4 as a Fourteenth Amendment claim, and not as a claim regarding
5 cruel and unusual punishment pursuant to the Eighth Amendment.
6 See Robinson v. Pickett, 16 Fed. App. 577, 579 (9th Cir. 2001)¹;
7 Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998); Estate of
8 Cole by Pardue v. Fromm, 94 F.3d 254, 259 & n.1 (7th Cir. 1996).
9 Cf. Jones v. Blanas, 393 F.3d 918, 931 (9th Cir. 2004) (noting
10 the "more restrictive" Fourteenth Amendment provisions apply to
11 pretrial detainees, and the Eighth Amendment applies to those
12 who have been convicted of a crime), cert. denied, 126 S. Ct.
13 351 (2005). Therefore, Plaintiff's motion to amend his
14 complaint to state a claim that his Eighth Amendment right was
15 violated by Defendants should be denied for failure to state a
16 claim on which relief may be granted.

17
18
19
20
21 1
22 If a claim implicates a specific constitutional right, then
23 the claim should be analyzed under the standard that
24 governs that right, and not under the Due Process Clause of
25 the Fourteenth Amendment.[]. Moreover, prison inmates, in
26 contrast with pretrial detainees or persons with
27 unrestricted liberty, are protected against unjustified
28 force by the Cruel and Unusual Punishments Clause of the
 Eighth Amendment and gain no greater protection from the
 Fourteenth Amendment. []. Thus, the district court was
 correct in analyzing [the plaintiff's] cruel and unusual
 punishment allegations exclusively under the Eighth
 Amendment.
(internal citations omitted).

Conclusion

Plaintiff should not be allowed to amend his complaint to add improper defendants to this suit. Additionally, Plaintiff should not be allowed to amend his complaint to add an Eighth Amendment claim, when Plaintiff asserts that, at all times relevant to his complaint, he was a pre-trial detainee. Plaintiff's claim does not appear to allege facts not included in the original complaint.

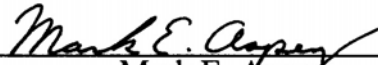
THEREFORE, IT IS RECOMMENDED THAT Plaintiff's motion to amend his complaint (Docket No. 22) be **denied**.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment.

Pursuant to Rule 72(b), Federal Rules of Civil Procedure, the parties shall have ten (10) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. Thereafter, the parties have ten (10) days within which to file a response to the objections. Failure to timely file objections to any factual or legal determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo appellate consideration of the issues. See United States v. Reyna-Tapia,

1 328 F.3d 1114, 1121 (9th Cir.) (en banc), cert. denied, 540 U.S.
2 900 (2003). Failure to timely file objections to any factual or
3 legal determinations of the Magistrate Judge will constitute a
4 waiver of a party's right to appellate review of the findings of
5 fact and conclusions of law in an order or judgment entered
6 pursuant to the recommendation of the Magistrate Judge.

7 DATED this 6th day of November, 2006.
8
9
10

11 

12 Mark E. Asper
13 United States Magistrate Judge
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28